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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN L. SUSOTT,
Plaintiff,
v.
DANIEL SUSOTT,
Defendant.

No. C 12-581 SI

In re the Matters of the:

No. C 12-597 SI

IRREVOCABLE LIFE INSURANCE TRUST
OF JOHN L. SUSOTT AND KATHRYN C.
SUSOTT UAD 8/17/1988 AS RESTATED,
EXEMPT TRUST FBO DANIEL C. SUSOTT

**ORDER GRANTING MOTIONS TO
REMAND; DENYING MOTION TO
CONSOLIDATE AND STRIKE AS
MOOT; AND REMANDING ACTIONS
TO THE MONTEREY COUNTY
SUPERIOR COURT**

IRREVOCABLE LIFE INSURANCE TRUST
OF JOHN L. SUSOTT AND KATHRYN C.
SUSOTT UAD 8/17/1988 AS RESTATED,
NON-EXEMPT TRUST FBO DANIEL C.
SUSOTT

Currently before the are motions to remand filed in 12-581 [Docket No. 7] and 12-597 [Docket No. 16]. There is also pending a motion to consolidate, filed by the defendant in both cases. *See* Docket No. 13 in Case 12-581; Docket No. 14 in 12-597. These matters, as well as a motion by the plaintiff in 12-597 to strike all or portions of the motion to consolidate [Docket No. 22 in Case No. 12-597], are currently set for hearing on April 20, 2012. Pursuant to Civil Local Rule 7-1(b), the Court finds these matters appropriate for resolution without oral argument and hereby VACATES the hearing. Having considered the papers submitted, and for good cause shown, the Court hereby GRANTS the motions to remand and DENIES the motions to consolidate and strike as moot.

BACKGROUND

Case No. 12-581 was removed to this Court on February 2, 2012, under the Court's diversity jurisdiction. The underlying complaint was filed in Superior Court for Monterey County on December 9, 2011, and alleges causes of action by plaintiff (John L. Susott, individually and as a trustee) against defendant (Daniel Susott) for Elder Financial Abuse (Cal. Wel. & Inst. Code §§ 15610.07, 15610.30); conversion under California law; constructive trust under California law; neglect (Cal. Wel. & Inst. Code § 15610.63); Elder Physical Abuse (Cal. Wel. & Inst. Code § 15610.63); and wrongful death under California law.

Case No. 12-597 was removed to this Court on February 6, 2012, also under the Court's diversity jurisdiction. The underlying petition was filed in Superior Court for Monterey County, probate court, on August 2, 2011. The petition was filed by Evan Auld-Susott and seeks an order removing and surcharging trustee (respondent Daniel Susott), compelling Daniel Susott to account, and seeking appointment of a successor trustee under various provisions of the California Probate Code.

Plaintiffs in both cases – John Susott and petitioner Evan Auld-Susott – have moved to remand these cases back to state court. Defendant and respondent in both cases, Daniel Susott, has moved to consolidate the removed cases. Plaintiff in 12-597 (Evan Auld-Susott) has moved to strike portions of the motion to consolidate.

LEGAL STANDARD

Under the removal statute, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant" to federal court. 28 U.S.C. § 1441(a). A district court has federal question jurisdiction in "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A district court has diversity jurisdiction where the matter in controversy exceeds the sum of \$75,000, and is between, *inter alia*, citizens of different States, or citizens of a State and citizens or subjects of a foreign state. 28 U.S.C. § 1332.

"The strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th

1 Cir. 1988) (citations omitted). Remand to state court must be ordered when a district court lacks subject
2 matter jurisdiction. *See* 28 U.S.C. § 1447(c).

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4 DISCUSSION

5 A. Motion to Remand Case No. 12-597

6 Petitioner Evan Auld-Susott moves to remand the petition in Case No. 12-597 back to probate
7 court in Monterey County. Petitioner asserts that in this case, the removal was untimely because the
8 removed petition was filed on August 12, 2011, respondent Daniel Susott appeared in that case on
9 September 16, 2011, and the thirty day time limit for removal ran on October 17, 2011 at the latest. *See*
10 28 U.S.C. § 1446(b); *see also* Declaration of James R. Stupar in support of motion to remand (Docket
11 No. 16) at ¶¶ 14, 17.

12 Daniel Susott admits the removal of this case was untimely, but asserts that because this case
13 is so closely related to Case No. 12-581, removal was appropriate because this Court could exercise
14 supplemental jurisdiction over the claims asserted in 12-597. *See* Oppo. at 2. Respondent's argument
15 is flatly without merit. Removal statutes must be strictly construed to limit removal jurisdiction and
16 doubts as to removability are resolved in favor of remand. *See Gaus v. Miles, Inc.*, 980 F.2d 564, 566
17 (9th Cir. 1992). Any diversity jurisdiction – the ground for removal relied on by respondent in his
18 notice of removal, Docket No. 1 at ¶ 10 – existed and was evident from the face of the petition filed in
19 state court. As such, respondent had thirty days from the date he was served with process or entered an
20 appearance in the state court action to remove that case to this Court. Respondent cannot revive
21 removability by invoking this Court's supplemental jurisdiction. The question of whether the Court can
22 exercise supplemental jurisdiction over claims initially filed in or properly removed to this Court does
23 not come into play where there was no federal jurisdiction over the case in the first instance. *Syngenta*
24 *Crop Prot., Inc. v. Henson*, 537 U.S. 28, 34 (2002) ("Ancillary jurisdiction, therefore, cannot provide
25 the original jurisdiction that petitioners must show in order to qualify for removal under § 1441.").

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1 Removal of this action was untimely. Therefore, petitioner's motion to remand [Docket No.
2 16] is GRANTED.¹
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4 **B. Motion to Remand Case No. 12-581**

5 Plaintiff John Susott ("John") moves to remand, arguing that removal in this case was also
6 untimely. This case was filed on December 9, 2011. Plaintiff authorized a process server to attempt to
7 serve defendant Daniel Susott ("Daniel") at Daniel's home in Hawaii. After numerous unsuccessful
8 attempts, plaintiff's process server hand-delivered the papers to Anto Sri, who answered the front door
9 of Daniel's residence on December 20, 2011. The process server signed a declaration under penalty of
10 perjury to this effect on January 25, 2012. Supplemental Declaration of Thomas A. Vogeles [Docket No.
11 18-1], ¶¶ 10-11 & Ex. 6. The process service company also declares that a copy of the complaint was
12 mailed to defendant Daniel Susott on December 20, 2011, to effectuate substitute service under Cal.
13 Code Civ. Proc. § 415.20(b); Supp. Vogeles Decl., Ex. 4. Substitute service is considered complete ten
14 days after the mailing of the complaint – here, on December 30, 2011 – and therefore, plaintiff argues,
15 Daniel had until January 30, 2012 to remove the action.² In fact, it was not removed until February 6,
16 2012.

17 Defendant Daniel Susott argues that service was not effectuated because Anto Sri was not a
18 member of his household authorized to accept service under CCP section 415.20. Mr. Sri's declaration
19 establishes that he does not reside at Daniel's Hawaii residence, but that he was merely a visitor who
20 had permission to stay there for a few days and that he visits "when he can." *See* Sri Declaration
21 [Docket No. 37-1]. Mr. Sri also declares that he did not see Daniel Susott prior to departing the house
22 and did not give him any papers or "even advise anyone that there were papers." *Id.*, ¶ 6. The Court
23 finds that because Mr. Sri was not only allowed to stay at Daniel Susott's home, but was also given the
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25 ¹ Since Case No. 12-597 is being remanded, respondent's motions to consolidate Case No. 12-
26 597 with Case No. 581 [Docket No. 13 in Case 12-581; Docket No. 14 in Case 12-597] are DENIED
27 as moot. Petitioner's motion to strike portions of the motion to consolidate [Docket No. 22 in Case No.
12-597] is DENIED as moot. Plaintiff's request for Judicial Notice [Docket No. 16-12] is DENIED as
moot.

28 ² Plaintiff calculates the last day to remove as January 31, 2012. Removal was untimely using
either date.

1 authority to control access to it by others – for example, given the apparent authority to answer the door
2 when the process server knocked – that he was a competent person who could be considered either a
3 “member of the household or a person apparently in charge” of access to the house sufficient to accept
4 service under CCP section 415.20.

5 This conclusion is supported by the California Court of Appeal’s decision in *Bein v. Brechtel-Jochim Group, Inc.*, 6 Cal App 4th 1387 (Cal. App. 1992). There, the court recognized that
6 the purpose of CCP section 415.20 is to permit service on a person whose ““relationship with the person
7 to be served makes it more likely than not that they will deliver process to the named party.”” *Id.*, 6 Cal
8 App 4th at 1393 (quoting *Assoc. v. Mendelson et al.*, 572 N.Y.S.2d 997, 999 (1991)). In that case, the
9 court found the service upon a gate guard was adequate to effectuate substitute service, based on the
10 nature of the relationship between the gate guard and the person being served. *Id.*; *see also Khourie v.*
11 *Sabek*, 220 Cal. App. 3d 1009, 1013 (Cal. App. 1990) (service effectuated where process server
12 attempted to leave a copy of the summons and complaint during usual office hours with the person
13 “apparently in charge of [the] office – i.e., the only person who responded to his attempt to enter.”).
14 Here Mr. Sri was apparently in charge of the household, as he was the only person to answer the door
15 on the process server’s seventh attempt to find someone home. *See* Supp. Vogelee Decl., Ex. 5.

16 Importantly, Mr. Sri does not say he did not accept the papers served, or otherwise contest the
17 veracity of the process server’s declaration. Similarly, Daniel Susott does not state when he returned
18 home to Hawaii; whether or when he discovered the copies that were served on Mr. Sri; or whether or
19 when he received the copies sent by mail as part of the substitute service. Daniel does not state whether
20 he in fact received a copy of the complaint in December, and he does not dispute that his attorneys were
21 aware of the filing of the lawsuit in December. Nor does he dispute that plaintiff’s counsel informed
22 Daniel’s counsel on January 23, 2012, that plaintiff’s counsel believed Daniel had been served on
23 December 20, 2011 in Hawaii. Vogelee Decl., ¶¶ 10-11; Declaration of Thomas J. Espinoza, ¶ 5.

24 Defendant also argues that, during a December 13, 2011 pre-mediation conference, the parties
25 agreed to a litigation “standstill,” and that plaintiff’s service of the complaint on defendant breached that
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1 agreement. The parties dispute much of what happened at the December 13 meeting,³ and no writing
2 was ever prepared, or apparently even contemplated, to memorialize the terms of any standstill
3 agreement. But it is clear that the fact that John had filed the complaint against Daniel was discussed
4 at some length, and no one suggests that the issue of removal was discussed or even mentioned. Further,
5 Daniel's counsel admit that at least by January 23, 2012, they had been told by John's counsel that
6 Daniel was served as of December 20, 2011. Under these circumstances, defense counsel could not rely
7 on the purported standstill agreement to refrain from filing a notice of removal.

8 Defendant also argues that multiple deficiencies in the actual proofs of service call into question
9 the validity of the substitute service. These defects include the following: the proof of service is not
10 signed under penalty of perjury; the telephone and email address the process server included on the
11 proof of service form was not his own telephone or address but that of Legal Solutions in Santa Ana,
12 California (the company who hired him on a contractor basis to serve Daniel Susott); and the proof of
13 service was not executed until January 25, 2012 (more than 30 days after service was made). The Court
14 does not find that these alleged defects undermine the service of process here. The Court acknowledges
15 that the proof of service is not signed under penalty of perjury, but the process server's declaration of
16 diligence – where he lists each attempt and provides details for the final, successful service on Mr. Sri
17 – is signed under penalty of perjury. Supp. Vogele Decl., Ex. 3. There is no evidence that it is against
18 practice in California for contracted process servers to list the name and address of the agency through
19 which they contracted on the proof of service. With respect to the arguments regarding the fact that the
20 proof of service was not signed until January 25, 2012, the Court finds the more important point here
21 is that Daniel Susott does not declare that he did not receive actual notice of this lawsuit, or describe
22 whether or when he returned home to Hawaii to find the service and mailed copies of the summons and

24 ³ The parties dispute the existence and terms of any “standstill” agreement. In addition, they
25 dispute whether John’s counsel agreed to give Daniel’s counsel a copy of the newly-filed complaint
26 (John’s counsel states that he offered to give copies to Daniel’s counsel, but was refused; Daniel’s
27 counsel state that they asked for copies of the complaint, but were refused). They also dispute whether
28 John’s counsel stated that the new complaint was out for service (John’s counsel states that he told
Daniel’s counsel that it was out for service; Daniel’s counsel state that John’s counsel said he had no
intention of serving the new complaint as of then.) It is clear from all the declarations, however, that
a lively discussion was had concerning the existence of the newly-filed complaint. *See* Declaration of
John Preston in Support of Opposition to Remand; Declaration of Eric Schenk in Opposition to
Plaintiff’s Motion to Remand; Declaration of Tom Espinoza in Support of Opposition to Remand; and
Supplemental Declaration of Thomas A. Vogeles.

1 complaint. In these circumstances, the Court does not find that the minor deficiencies identified by
2 defendant are material or otherwise make the substitute service ineffective.

3 Based on all the facts presented to the Court, and considering that removal statutes must be
4 strictly construed to limit removal jurisdiction and doubts as to removability are resolved in favor of
5 remand, *Gaus v. Miles, Inc.*, 980 F.2d at 566, the Court GRANTS the motion to remand Case No. 12-
6 581.⁴

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8 **C. Plaintiffs' Requests for Attorneys' Fees and Costs**

9 Plaintiffs in both cases seek an award of attorneys fees and costs incurred in moving for remand.
10 "An order remanding the case may require payment of just costs and any actual expenses, including
11 attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "Absent unusual
12 circumstances, courts may award attorney's fees under § 1447(c) where the removing party lacked an
13 objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis
14 exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). The Court
15 finds that attorney's fees are inappropriate in these cases, and therefore, plaintiffs' motions for fees are
16 DENIED.

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18 **CONCLUSION**

19 For the foregoing reasons, the Court GRANTS the motions to remand and DENIES the motions
20 to consolidate and strike as moot. All other pending motions are DISMISSED without prejudice to
21 refiling in state court, and these cases are remanded to the Superior Court for the County of Monterey.

22 **IT IS SO ORDERED.**

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24 Dated: April 11, 2012



SUSAN ILLSTON
United States District Judge

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28 ⁴ Defendant's objections to evidence in support of remand in 12-581 [Docket No. 15-2] are
OVERRULLED.